

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**BIG GREEN MOVING LLC, DBA
BIG GREEN MOVING,**

Respondent.

**Docket No. FMCSA-2008-0251¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On June 4, 2008, the Virginia Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on Big Green Moving, LLC, dba Big Green Moving (Respondent).² The NOC, based on a May 8, 2008, compliance review, charged Respondent with three violations of 49 U.S.C. § 13702, charging a rate not contained in a tariff, with a proposed civil penalty of \$1,500 per count and a total penalty of \$4,500.

After Respondent failed to respond to the NOC, the FMCSA's Field Administrator for the Eastern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on July 10, 2008.³ The NDFAO advised Respondent that

¹ The prior case number was VA-2008-0248-US1187.

² See Exhibit A to Field Administrator's Opposition to Petition for Reconsideration (hereafter Claimant's Opposition).

³ See Exhibit B to Claimant's Opposition.

the NOC would become the Final Agency Order in this proceeding effective July 15, 2008, with the civil penalty immediately due and payable on that date.

On August 5, 2008, Respondent served a Petition for Reconsideration.⁴ The petition claimed that Respondent's failure to timely respond to the NOC was due to excusable neglect because it is a small business without an administrative staff and that its limited resources were overwhelmed by the "burden of the administrative process," particularly because this process coincided with its busy season. As a result of these circumstances, it was unable to meet the deadline for responding to the NOC.

Respondent did not address the substance of the violations alleged in the NOC.

In his Response to the Petition served August 11, 2008, Claimant contended that the Petition should be denied because Respondent failed to timely respond to the NOC and did not present sufficient grounds for vacating the Final Agency Order.⁵

2. Decision

It is undisputed that Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a).⁶ Therefore, it defaulted. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent

⁴ See Exhibit C to Claimant's Opposition. The NDFAO was initially delivered to Respondent's previous address and re-delivered to its current address on July 21, 2008. Claimant stipulated that the Petition for Reconsideration was timely filed.

⁵ Although the NDFAO was initially delivered to the incorrect address, Claimant submitted a signed receipt demonstrating that Respondent accepted delivery of the NOC at its former address on June 9, 2008. See Exhibit B to Claimant's Opposition.

⁶ The NOC reply deadline was July 9, 2008. This date was calculated by adding 30 days to the June 4, 2008, service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has not met its burden of demonstrating that the Final Agency Order should be vacated. Respondent's explanation for failing to respond to the NOC—that it is a small operation with limited resources and was too busy to attend to its regulatory burdens—is insufficient to establish excusable neglect. Respondent had an obligation to ensure that a timely response to the NOC was filed. It could have requested an extension of the reply date but did not do so. Many, if not most, of the motor carriers subject to FMCSA jurisdiction are small businesses with limited administrative resources. Complying with their regulatory responsibilities is a part of doing business in a highly regulated industry and failure to attend to these important responsibilities for the reasons set forth by Respondent does not amount to excusable neglect. Consequently, I conclude Respondent has not established that its failure to timely reply to the NOC was due to excusable neglect. Furthermore, because Respondent's petition did not address the substance of the violations alleged in the NOC, it did not present any meritorious defenses.

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing its Petition for Reconsideration roughly two weeks after receiving the NDFAO, it would be an empty

exercise or futile gesture to vacate the Final Agency Order if Respondent is unable to demonstrate a meritorious defense.⁷

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.⁸ Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.⁹

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹⁰

It Is So Ordered.


Rose A. McMurray

Assistant Administrator
Federal Motor Carrier Safety Administration

1-7-10
Date

⁷ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

⁸ See *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

⁹ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration, March 15, 2002.

¹⁰ The July 10, 2008, NDFAO stated that the \$4,500 civil penalty was due and payable on July 15, 2008, the date that the NOC would become the Final Agency Order. Because Respondent petitioned for reconsideration on August 5, 2008, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 8 day of January, ²⁰¹⁰~~2009~~, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Brendan Malley, Owner
Big Green Moving, LLC
P.O. Box 7481
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One Copy
U.S. Mail

John C. Bell, Esq.
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A handwritten signature in cursive script, reading "Jennie Miller", is written over a horizontal line.